Office - Supreme Court, U.S.
FILED
JUN 17 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1683

In the Supreme Court of the United States

OCTOBER TERM, 1984

GLENN R. DOBEY, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Brady v. *United States*, 397 U.S. 742 3

Byers v. *United States*, cert. denied, No. 84-5120 (Oct. 29, 1984) 2, 3

Foreman v. *Collins*, cert. denied, No. 83-1616 (Oct. 1, 1984) 3

Jenkins v. *United States*, cert. denied, No. 84-5123 (Feb. 19, 1985) 2

Palmore v. *United States*, 411 U.S. 389 4

Swain v. *Pressley*, 430 U.S. 372 4

Constitution and statutes:

U.S. Const. :

Art. III 1, 2, 3, 4

Amend. V 2

18 U.S.C. 3401 ..... 1, 2

18 U.S.C. 3401(b) 3

18 U.S.C. 3402 2

26 U.S.C. 7203 1

28 U.S.C. 636(a)(3) 1, 2

28 U.S.C. 636(c) 2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1683

GLENN R. DOBEY, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401, which authorize federal magistrates to conduct trials and enter judgments in misdemeanor prosecutions if the defendant consents, violate Article III of the Constitution.

1. Petitioners, husband and wife, were charged with two misdemeanor counts of willful failure to file their individual federal income tax returns for the years 1978 and 1979, in violation of 26 U.S.C. 7203. Prior to trial, petitioners executed written forms consenting to having the case tried by a United States magistrate.[1] Following a jury trial before a

[1]The forms provided as follows (Pet. App. 5a):

> The United States magistrate has explained to me the nature of the offense(s) with which I am charged and the maximum possible penalties which might be imposed if I am found guilty. The

magistrate in the United States District Court for the District of New Mexico, petitioners were found guilty on both counts, and each was sentenced to one year's imprisonment on the count relating to the year 1978 and placed on five years' probation and fined $2,000 on the count relating to the year 1979. Pet. App. 5a.

Petitioners appealed their convictions to the district court (see 18 U.S.C. 3402) on Fifth Amendment grounds unrelated to the question presented in the petition. The district court affirmed. Petitioners then appealed to the court of appeals, asserting that the statutes providing for a consensual reference to the magistrate violate Article III of the Constitution. The court of appeals rejected that contention and affirmed their convictions (Pet. App. 4a-10a).

2. 28 U.S.C. 636(a)(3) and 18 U.S.C. 3401 authorize federal magistrates to conduct trials and enter judgments in misdemeanor prosecutions if the defendant consents. In *Byers* v. *United States,* cert. denied, No. 84-5120 (Oct. 29, 1984), and *Jenkins* v. *United States,* cert. denied, No. 84-5123 (Feb. 19, 1985), this Court declined to review the question whether these statutes violate Article III of the Constitution. This question is no more worthy of review in this case.

As we explained in our brief in opposition in *Byers* (at 6-7), 18 U.S.C. 3401 is the counterpart to 28 U.S.C. 636(c), which permits civil cases to be referred to magistrates with the consent of the parties. Every court of appeals that has

---

magistrate has also informed me of my right to assistance of legal counsel. The magistrate has also informed me of my right to trial, judgment, and sentencing before a United States district judge.

I HEREBY: Waive (give up) my right to trial, judgment, and sentencing before a United States district judge and I consent to trial, judgment, and sentencing before a United States magistrate.

considered the question has upheld the constitutionality of 28 U.S.C. 636(c), and this Court has consistently denied certiorari. See 84-5120 Br. in Opp. 6.[2]

Petitioners do not appear to attempt to distinguish between the consensual reference of civil trials to magistrates and the consensual reference of misdemeanor prosecutions, and as we demonstrate in our brief in opposition in *Byers* (at 7), no such distinction would be valid. Criminal defendants, like civil litigants, may waive the right to a trial altogether. See, *e.g., Brady* v. *United States,* 397 U.S. 742, 748 (1970). Petitioners concede (Pet. 3, 5, 26) that they executed written consents that, by their express terms, waived their right to "trial, judgment, and sentencing before a United States district judge" in this case.[3] Article III does not establish an unwaivable barrier to the trial of a criminal case before a magistrate, any more than it precludes the consensual trial of civil cases by magistrates: the text of

---

[2]We have served on petitioners' counsel a copy of our brief in opposition in *Byers,* as well as a copy of our brief in opposition in *Foreman* v. *Collins,* cert. denied, No. 83-1616 (Oct. 1, 1984), where we explain why the question whether 28 U.S.C. 636(c) is constitutional does not merit this Court's review.

[3]Although petitioners concede that "this Court could dispose of this petition on the ground of waiver" (Pet. 26), elsewhere in the petition (at 5-9) petitioners appear to claim that their waiver was ineffective because the magistrate did not explain the difference between a magistrate and an Article III judge. Petitioners did not raise this argument in their brief before the court of appeals, and it is without merit. 18 U.S.C. 3401(b) requires that a magistrate "carefully explain to the defendant that he has a right to trial, judgment, and sentencing by a judge of the district court * * *." Petitioners certified that they received such an explanation before consenting to trial by a magistrate. Petitioners were free to seek advice from counsel on the potential differences between a trial by a magistrate and trial by a judge, and they cite no authority for the proposition that the magistrate was obligated to "advise[] the[m] * * * of Article III" (Pet. 8) or provide a detailed legal explanation of the differences between magistrates and judges.

Article III does not distinguish between civil and criminal litigation, and this Court has specifically ruled that "the Constitution does not require that all persons charged with federal crimes be tried in Art. III courts" (*Swain* v. *Pressley,* 430 U.S. 372, 382-383 (1977) (footnote omitted)). See also *Palmore* v. *United States,* 411 U.S. 389, 400, 402, 407 (1973).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Acting Solicitor General

JUNE 1985